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IN THE

Supreme Court of the United States

October Term, 1953

No. ~~414~~ 15

AUSTIN F. MCFEE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Austin F. McFee prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on August 24, 1953, affirming the judgment of the United States District Court for the District of Idaho, Northern Division.

Opinion Below

The opinion of the Court of Appeals (R. 444) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered August 24, 1953. The jurisdiction of this Court is invoked under section 1254(1) of Title 28, United States Code, and

section 2101(d) Title 28, United States Code, and section 37(b)(2) of the Rules of Criminal Procedure for the United States District Courts.

Questions Presented

1. Where the prosecution's proofs of the essential elements of a criminal case were dependent upon circumstantial evidence, and where there was substantial evidence upon which a reasonable hypothesis of innocence could be predicated, and where the trial court did not charge the jury that, in order to convict the defendant, the evidence not only should establish guilt, but also should exclude every reasonable hypothesis of innocence, and such omission was called to the attention of the court and an exception noted, and where, after eight hours of deliberation the jury was unable to agree on a verdict and requested the court to repeat its instructions on circumstantial evidence and the court then instructed the jury that circumstantial evidence is competent evidence and should be given such weight as the jury may determine, and is sufficient to uphold a conviction, and the jury then retired and brought in a verdict of guilty shortly thereafter, did the court err in failing to instruct the jury as to the circumstantial evidence rule, referred to above?

2. Were the trial court's incomplete and inadequate instructions on circumstantial evidence, given to the jury upon the latter's request after some eight hours of deliberation, cured of their defects by reason of the unilluminating previous instructions originally given to the jury prior to its first retirement?

3. Where certain temporary collection records, after recordation in the books of account had been turned over to the defendant in 1945 and 1946 (the record being silent as to whether such temporary records were still in existence at the time of the trial in 1952), and where all of such temporary records, if still in existence and if produced by

the defendant, might have either corroborated or discredited the testimony of eight of defendant's witnesses to the effect that all of such income transactions had not been handled by the defendant but had been handled, or recorded on the books of account, by such employees and where the defendant himself, obviously was the only witness who could have established that such records, if produced, were all the records that he received or who could have established what he had done with such records, if not produced, did the comments of the trial court to the jury, stating that the defendant's failure to produce or account for such records was an "outstanding matter" which the jury should consider (a) invade the defendant's right under the Act of March 16, 1878, c. 37, 20 Stat. 30, now 18 USCA, sec. 3481, to refrain from testifying without adverse presumption arising therefrom, or (b) invade the defendant's constitutional right under the Fifth Amendment not to be a witness against himself?

Statutes Involved

Title 26, USCA, Sec. 145(b): Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Title 18, USCA, Section 3481:

Competency of accused.—In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make

such request shall not create any presumption against him. (June 25, 1948, c. 645, Par. 1, 62 Stat. 833.)

Fifth Amendment to the Constitution:

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement

The petitioner, McFee, was indicted, tried by a jury, convicted, sentenced to imprisonment and fined for wilful attempt to defeat and evade income taxes due and owing by him for each of the years 1945 and 1946 in violation of section 145 (b) of the Internal Revenue Code, 26 USC, Sec. 145(b). The imprisonment on the second count (for the year 1946) was conditionally suspended. Defendant is now on bail.

The theory of the prosecution's case was that the petitioner, who was engaged in the operation of coin operated machines known as slot machines, phonograph machines, pinball machines, and vending machines in Northern Idaho, and who also operated a tavern, had in some unknown manner obtained unreported proceeds from the coin operated machines.

1. The prosecution's proofs as to unreported income and as to wilfulness were based wholly on circumstantial evidence, being presented in the form of "unexplained" expenditure and net worth computations (R. 241, 245). There was no direct evidence showing or tending to show that

the petitioner received or had access to any amount, or any known source, of unreported income. There was no evidence as to any error in his books of account either as to gross income or deductions, or otherwise. There was no evidence of unexplained bank deposits. There was no evidence of, or reference, to any scheme or device which was, or might have been, used by the defendant. The only evidence was that the defendant had "unexplained expenditures" during the taxable years, in excess of his income, and from sources unknown (R. 242, 252-253).

Evidence produced by the prosecution showed that the defendant claimed that he had had cash on hand which was not included in the Government's expenditures and net worth computations (R. 264, Exhibits 49 and 50) and that petitioner had spent $114,000 for assets in 1943, which also were not included in such computations (R. 263, Exhibits 49 and 50) and which could have been on hand or converted into cash immediately prior to or during the taxable years.

The defendant's evidence showed (1) That the defendant had been in business for many years prior to the year of the basic starting point for the prosecution's net worth computation; (2) that the defendant had a large amount of cash on hand in a safe during the taxable years which was not taken into account in the government's computations, (R. 395) (3) that he did not handle or have access to any of the gross receipts of his coin operated machines (which under the theory of the prosecution was the source of the unreported income) or of his tavern, or taverns, until after its collection and recordation in the books of account by his employees (R. 297, 302, 327, 335, 361, 398 and 209); and (4) that he spent $102,700 in cash in 1943 for assets which were not taken into account in the government's net worth or "expenditures" computations (R. 307, 324). These assets or their cash conversion equivalent were not shown to have been dissipated by 1945. This evidence, if believed, was sufficient to establish the defendant's innocence.

The trial court's instructions to the jury, touching upon circumstantial evidence, were as follows:

> ". . . You are bound by your oaths to accept the instructions of this Court as the law in the case." (R. 415)
>
> • • • • • • • • • •
>
> "The Government has attempted to establish the defendant's income for the years 1945 and 1946 by showing that he accumulated more and spent more in these years than he reported on his tax returns. This is in the nature of circumstantial evidence. Therefore, you should consider whether or not the Government has precluded every reasonable source of these funds except earnings for the years charged. However, the Government is not required to refute all possible speculation as to the source of these funds." (R. 420)
>
> • • • • • • • • • •
>
> "Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.
>
> "Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.
>
> "You are instructed that throughout this proceeding the counsel for defendant has asserted that he may have accumulated money in previous years with which to make such investments and impliedly, out of unexplained income. In a prosecution for attempting to evade income taxes by filing false and fraudulent returns where government relies upon net worth method to establish defendant's income, the Government is not required to refute all possible speculation as to the source of defendant's asserted funds." (R. 421-422)

At the conclusion of the court's instructions, counsel for defendant stated (R. 424):

> "Mr. Emigh: We would like an exception to the failure of the Court to give the requested instruction

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that not only must the evidence prove guilt but that it must (427) prove the hypothesis of guilt to the exclusion of all other hypotheses.

"The Court: You may have your exception."

* * * * * * * *

After eight hours of deliberation the jury returned to the court room at 8:30 p.m. and the following proceedings were had (R. 425-6):

"The Court: You have been deliberating for some eight hours, have you been able to agree upon a verdict:

"Foreman: Not yet.

"The Court: Is there any assistance the Court can give you? I don't want to know what the Jurors think but is there any questions you have?

"Foreman: Yes, the question of circumstantial evidence, we would like that instruction.

"The Court: Would you like me to give that again?

"Foreman: Yes.

"The Court: I will read the instruction. Would you like all the instructions again?

"Foreman: Just as to circumstantial evidence.

"The Court: Evidence is of two kinds, positive and circumstantial. Positive or direct evidence is said to be when the witness testifies directly out of his own personal (428) knowledge to the matters in issue. Evidence is circumstantial when a witness testifies to matters having only an indirect or circumstantial bearing upon such issue.

"Circumstantial or indirect evidence, under our law, as well as positive or direct evidence, is competent evidence and is to be given such weight as you determine it is entitled to.

"Either positive or circumstantial evidence will uphold a conviction.

"Is there any other part of the instructions you would like?

"Foreman: That is all."

The jury thereupon retired and brought in a verdict of guilty shortly thereafter (R. 32).

2. The collections from the coin operated machines were made by employees who recorded all collections in triplicate in little books referred to by the Court as "books of tickets." The machines were locked and McFee did not have a key. One copy was given to the location owner who received one-half of the proceeds and receipted for his half. Another copy was turned over to petitioner's manager of that particular area together with the cash which was reconciled with the "tickets", deposited in bank and recorded on the books of account. The third triplicate copy was turned over to McFee. The record is silent as to whether McFee retained these temporary records or "books of tickets" up to the time of trial. A blank book of tickets was received in evidence as Exhibit No. 39 at the time of trial for illustrative purposes (R. 207).

The Court, commenting on the evidence said (P. 417):

> "You are instructed that if you find substantial evidence (419) outside of defendant's own statements consisting of increase of net worth during the taxable years or any absence of personal records or books of account or the failure of books and records to show fully its transactions or those of the defendant then this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through whatever means he might do so.
>
> "I don't want to comment on the evidence but there is one outstanding matter that you are left in the dark about, I don't intend to make any inference about it, as the evidence here is solely for you. But where are the tickets that should show the receipts and division of the money taken from the slot machines for the years 1945 and 1946. There was only one of these books of tickets introduced in evidence by the defense. None of the witnesses, bookkeeper, manager or other witnesses for the defense produced these tickets and all said they had no knowledge of these tickets. The tickets were traced to the possession of defendant McFee. It seems to the Court that if the tickets balanced with the bank account that it would have been an easy matter for the defense to produce the tickets if they have

not been destroyed. Why were they not produced to show the receipts of the slot machines for these years?"

Thereafter the following proceedings were had (R. 424):

"The Court: Does the defendant wish to register any exceptions to the instructions as given?

"Mr. Purdy: Regarding the instruction in which the Court made some comment as to the collection books.

"The Court: You will have to specify what your exceptions are.

"Mr. Purdy: We except to the portion of the Court's instruction in relation to the failure of the defendant to retain the sales slips, or collection slips.

"The Court: You may have your exception.

(In the presence of the jury.)

"The Court: Ladies and Gentlemen of the Jury: when I instructed you I made some comment concerning the failure of the defendant to produce these sales slips or tickets, check on the slot machines, or receipts from the slot machines. You understand that you are not to draw any inference from the Court's remarks, these are questions of fact for the jury, and you are not to be influenced by any remarks by the Court as to what the Court thinks about the testimony."

3. On appeal the defendant-appellant urged, among other things,

(1) That the trial court erred in not instructing the jury that in order to sustain a conviction the evidence must be consistent with guilt and inconsistent with every reasonable hypothesis of innocence.

(2) That the trial court's supplemental instruction to the jury on circumstantial evidence was wholly inadequate and prejudicial (Resp. br. pp. 83-84); and

(3) That the trial court's comments to the jury that they should consider as an "outstanding" circumstance the failure of the defendant to account for or produce the temporary records traced to his possession, was erroneous and prejudicial.

The Court of Appeals held:

(1) That the jury was adequately instructed with clarity and force on the subject of circumstantial evidence (R. 453);

(2) It did not comment on, but glossed over, the supplemental or "last minute" instructions (R. 453-4); and

(3) It held that the comments of the trial court were proper and not prejudicial (R. 454).

REASONS FOR GRANTING THE WRIT

I.

There is a lack of uniformity among the Courts of Appeals for the several Circuits in the application of the circumstantial evidence rule.

A defendant in the Ninth Circuit has a far greater handicap in a criminal case based on circumstantial evidence than a defendant in most of the other circuits. Even though specifically requested by the defendant, a trial court in the Ninth Circuit need not instruct a jury in a criminal case, where vital portions of the prosecution's case are dependent on circumstantial evidence, that in order to sustain a conviction the evidence must not only be consistent with guilt but also inconsistent with every reasonable hypothesis of innocence.

On the other hand, in the recent Fifth Circuit case of *Bryan* v. *United States*, 175 F. (2d) 223, 226, the court in reversing the lower court, said:

> "The evidence, being circumstantial must exclude every reasonable hypothesis other than the guilt of the defendant."

Similarly in *Anderson* v. *United States* (5 Cir.) 30 F. (2d) 485, 487, the same Court said:

> "It is a fundamental rule of evidence that in order to support a conviction, circumstantial evidence must

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> exclude every reasonable hypothesis other than that of guilt."

If that is a correct statement of law, a defendant in the Ninth Circuit is entitled, in a similar case, to have an instruction so stating, given to the jury. The court denied the defendant that right in the present case. Both the *Bryan* case, *supra,* and the present case, involved income tax prosecutions based on "net worth" computation and in both there was a basis for a reasonable hypothesis of innocence.

This divergence as between circuits, prompted Judge Goodrich to suggest, in *United States* v. *Dolasco,* (3 Cir.) 184 F. (2d) 746, 748, that the circumstantial evidence rule may be *"archaic and based on mistaken premises."* In support of his observation he cited, *McCoy* v. *United States,* (9 Cir.) 169 F. (2d) 776, 784, and *United States* v. *Becker,* (2 Cir.) 62 F. (2d) 1007, 1010, and Wigmore, Evidence sec. 26, (3rd Ed. 1940).

Prior to its decision in *McCoy* v. *United States, supra,* the Ninth Circuit had recognized and followed the circumstantial evidence rule stated above, *Paddock* v. *United States,* 79 F. (2d) 872, 876; but the latter case was specifically overruled by *McCoy* v. *United States, supra.* Since that time the Ninth Circuit has followed the rule that where a general instruction in proper form on "reasonable doubt" is given, the circumstantial evidence instruction need not be given to a jury, even though requested by the defendant and even though the prosecution's case is entirely dependent upon circumstantial evidence, and the evidence could support a reasonable hypothesis of innocence.

In the present case the Court of Appeals has gone even further than it did in *McCoy* v. *United States, supra.* In the *McCoy* case the evidence was not entirely circumstantial; there was some direct evidence of guilt. In the present case there was none. The evidence of guilt was *wholly* circumstantial, and there was evidential support for a reasonable hypothesis of innocence. Furthermore, in the

McCoy case, the instructions taken as a whole, were deemed to be adequate, whereas in the present case the instructions, particularly the supplemental instructions on circumstantial evidence given after eight hours of deliberation, were wholly inadequate (R. 425).

With respect to the differences between the Circuits, Judge Goodrich pointed out in *United States* v. *Dolasco, supra,* (184 F. (2d) 746, 748) that the Third Circuit as well as some other circuits strictly adhere to the circumstantial evidence rule but that there was no occasion to re-evaluate the rule in that case because the circumstantial evidence instruction had been given to the jury.

Strict adherence to the rule is illustrated by the following cases:

Fifth Circuit

Bryan v. *United States,* 175 F. (2d) 223, 226
Strickland v. *United States,* 155 F. (2d) 167, 168
Thompson v. *United States,* 145 F. (2d) 826, cert. den. 324 U.S. 861, 65 S. Ct. 866, 89 L. Ed. 1418
Anderson v. *United States,* 30 F. (2d) 485, 487

Sixth Circuit

Epstein v. *United States,* 174 F. (2d) 754, 769
McLendon v. *United States,* 13 F. (2d) 777, 779

Seventh Circuit

Fenwick v. *United States,* 177 F. (2d) 488, 490

Eighth Circuit

Banks v. *United States,* 204 F. (2d) 666, 672
Gurera v. *United States,* 40 F. (2d) 338, 340

Tenth Circuit

Stryker v. *United States,* 95 F. (2d) 601, 604

The foregoing cases show that there is a distinct lack of uniformity between the Courts of Appeals for the Ninth

and probably the Second Circuits on the one hand, and the Courts of Appeals for the Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits, on the other hand, as to the required degree of adherence to the circumstantial evidence rule. In the former circuits the general instruction on "reasonable doubt" will suffice, while in the latter circuits the circumstantial evidence instruction must be given, when requested, in a case dependent upon circumstantial evidence.

The present case presents an excellent medium for clarification of the rule, for this defendant clearly was prejudiced by the supplemental instructions on circumstantial evidence given by the trial court at their request. The jurors, who for eight hours had held out for acquittal, were quickly silenced by the trial court's instruction (1) that circumstantial evidence is competent evidence, (2) that it is sufficient to convict, and (3) that they were the sole judges of its weight (R. 425). The defendant might well have been acquitted had his trial been held in another circuit where the circumstantial evidence rule is recognized and strictly adhered to.

The question is one of general importance. Current case reports confirm the common knowledge of the pendency of a substantial number of criminal cases, particularly tax cases based upon "net worth" and "expenditures" computations. Such cases depend on circumstantial evidence. There should be uniformity among the several circuits as to the applicability of the circumstantial evidence rule.

II.

The decision of the court of appeals is probably in conflict with the decision of this court in Bollenbach v. United States, 326 U. S. 607, 612, in that the inadequate supplemental instruction on circumstantial evidence was not cured by a prior "unilluminating abstract charge" in the original instructions.

In *Bollenbach* v. *United States,* 326 U.S. 607, 612, 66 S. Ct. 402, 405, 90 L. Ed. 350, this court said:

> "... jurors are ever watchful of the words that fall from him (the trial judge). Particularly in a criminal trial, the judges last word is apt to be the decisive word. *If it is a specific ruling on a vital issue, the error is not cured by a prior unexceptional and unilluminating abstract charge.*" (Italics added)

In the present case the jury, being unable to agree after eight hours of deliberation, returned to the court room and requested further instruction on circumstantial evidence. The court then defined circumstantial evidence and instructed them (1) that circumstantial evidence is competent evidence, (2) that it is to be given such weight as the jury determines it is entitled to, and (3) that it will uphold a conviction. (R. 425). The jury then retired and, shortly thereafter, brought in a verdict of guilty (R. 32).

On appeal the defendant-appellant urged the inadequacy of the original instructions *as well as the supplemental instructions* on circumstantial evidence as ground for reversal (Appellant's Brief, pp. 81, 84-85). The appellate court did not mention the supplemental instructions in its opinion. It held that the instructions as a whole on circumstantial evidence stated the law with "clarity" and "force" and that "the jury was adequately instructed on this point." (R. 454)

The trial court did not state the circumstantial evidence rule to the jury in its original instructions, although requested by the defendant (see p. 7, supra, and R. 420, 424, 425). It covered the rule, if at all, by indirection. It

told the jury that they "should consider whether or not the government had precluded every reasonable source of these funds except earnings for the year charged" (R. 420), but the court did not tell the jury what to do, after they so "considered." It did not tell the jury that in order to sustain a conviction the evidence must not only be consistent with guilt, but also inconsistent with any reasonable hypothesis of innocence. Furthermore, the *supplemental* instructions were wholly inadequate. Even under the rule followed in the Ninth Circuit, the supplemental instructions would have to be reinforced or supplemented by the original instructions on "reasonable doubt" in order to be adequate. The original instructions, obviously, were not clear to the jury because they asked specifically for further instructions on circumstantial evidence. The requested supplemental instructions were on a vital issue—the one issue upon which the jury was in disagreement. Under the rule stated by this court in *Bollenbach* v. *United States, supra,* the supplemental instructions on a vital issue must stand on their own feet. Their inadequacy is "not cured by (the) prior . . . unilluminating abstract charge."

While the record (R. 426) does not show that an exception was taken to this supplemental instruction it is apparent that such a proceeding would have been useless. The failure to instruct as to the circumstantial evidence rule had already been called to the attention of the court during the course of the original instructions and the request had been denied and an exception noted (R. 424). Under such circumstances this Court may notice the error. *Screws* v. *United States,* 325 U.S. 91, 107, 65 S. Ct. 1031, 1038, 89 L. Ed. 1495; *Johnson* v. *United States,* 318 U.S. 189, 200, 63 S. Ct. 549, 555, 87 L. Ed. 704, particularly where it was urged on appeal and concerned the one issue which the jury considered to be the vital point in the case. See also, *United States* v. *Raub* (7 Cir.) 177 F. (2d) 312, 315. A conviction ought not rest on an equivocal direction to the

jury on a basic issue. *Estep* v. *United States,* 327 U.S. 114, 145, 66 S. Ct. 423, 438, 90 L. Ed. 567.

III.

There is a probable conflict between the decision of the Court of Appeals in the present case and the decisions of the Supreme Court in Bruno v. United States, 308 U.S. 287, 293, 60 S. Ct. 198, 200, 84 L. Ed. 257, and Wilson v. United States, 149 U.S. 60, 13 S. Ct. 765, 37 L. Ed. 650, in that the trial court's comments to the jury raised an adverse presumption against the defendant for failing to take the witness stand in his own defense.

The comments of the trial court and the exception thereto are set forth in full at page 8 hereof. In effect, the court told the jury that the defendant's failure to testify regarding certain temporary records referred to as "books of tickets" was, in its opinion an "outstanding matter" which they should consider. The Court pointed out that these "books of tickets" had been traced to the defendant's personal possession (in 1945 and 1946). Obviously, he was the only person who could account for his own disposition thereof—or if he had produced them he was the only person who could have testified that the books of tickets produced were *all* of the books which he received. There would be no point in merely producing those books which his own witnesses had testified had been properly recorded in his books of account. The point was that the court suspected that there may have been other "books of tickets" not recorded (although there was not the slightest evidence on this point). There was no witness, other than the defendant, who could have covered this point. The logical inference to be drawn by the jury from the court's remarks was that the defendant's failure to testify on this point was an "outstanding matter" giving rise to an adverse presumption. Thus the trial court did, indirectly, that which is specifically proscribed by Title 18 USCA, sec. 3481, which provides that a defendant's failure to testify shall not create any presumption against him.

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In *Wilson* v. *United States,* 149 U.S. 60, 13 S. Ct. 765, 37 L. Ed. 650, this Court held that neither the court nor the prosecution may by obvious indirection, raise such an adverse presumption. The latter case is cited with approval in *Johnson* v. *United States,* 318 U.S. 189, 196, 63 S. Ct. 549, 553, 87 L. Ed. 704.

In *Bruno* v. *United States,* 308 U.S. 287, 292, 60 S. Ct. 198, 200, 84 L. Ed. 257, this Court held that pursuant to the provisions of 18 USCA, sec. 3481, (formerly 28 USCA Sec. 632), the defendant in a criminal case has the right to have his failure to take the witness stand "not tell against him."

If the comments of the court be construed as we have construed them, which, we submit, is their fair import to the jury, the decision of the Court of Appeals in the present case is in conflict with both *Wilson* v. *United States, supra,* and *Bruno* v. *United States, supra,* and is adequate ground for reversal.

Furthermore, there was absolutely no evidence in the case, whether direct or indirect, which established, or which tended to establish, that the defendant obtained any amount of unreported income whatever during the years in issue from the coin operated machines (which was the source upon which the theory of the prosecution was premised) or from any other source designated in the government's Bill of Particulars.

There was no evidence, direct or indirect, of any irregularity in defendant's books of account, or in operation of his business during the years in issue, or in the manner of handling the "books of tickets." The latter were temporary records, not normally preserved by businessmen and not required by regulation or law to be preserved.

The comment of the trial court could not do otherwise than create in the minds of the jurors the impression that it was incumbent upon the defendant to establish his innocence by proving a negative when the positive had not been established by the prosecution. Its effect was to re-

quire him to demonstrate that he had *not* received any unreported income from this particular source, when the prosecution had never established, directly or indirectly, that he had received any such income from such source, or any other source. The comment was erroneous and highly prejudicial.

IV.

The trial court's comments referred to in III above were in derogation of the defendant's constitutional right under the Fifth Amendment not to be a witness against himself.

The exercise of the defendant's constitutional privilege, not to be a witness against himself "would be a mockery of justice if either party is to be injuriously affected thereby." *Johnson* v. *United States,* 318 U.S. 189, 197, 63 S. Ct. 549, 553, 87 L. Ed. 704. The effect of the trial court's comment was to call the attention of the jury to the failure of the defendant, himself, to account for certain temporary records traced to his personal possession some seven or eight years prior to the trial. The defendant could do this only by taking the witness stand. The fair import of the comment is that defendant's failure to do so was an "outstanding matter" to be considered by them. Such comment, we submit, was in derogation of the defendant's constitutional right and was highly prejudicial.

Conclusion

For the reasons stated above, petitioner respectfully requests that his petition be granted.

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